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The Responsibility of International Organizations for Multinational Military Operations: Passing the Buck?

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1. INTRODUCTION

Breaking the law must have consequences. Rules of law formulate expectations about how we should conduct ourselves. Unless a party that fails to meet these expectations becomes responsible for its non-compliance, the very idea of binding rules of law would be an illusion. Accountability in the form of legal responsibility is therefore an essential element of every legal order.

The idea of legal responsibility is well-established in international law. In the *British Claims in the Spanish Zone of Morocco* arbitration of 1925, Max Huber declared responsibility to be an undisputed principle of international law:

> "Responsibility is the necessary corollary of a right. All international rights involve international responsibility as their consequence. Responsibility results in the duty to make reparation if the obligation in question is not met."[1]

A few years later, the Permanent Court of International Justice affirmed this point in the *Chorzów Factory* case, observing that "it is a principle of international law, and even a general conception of law, that any breach of an engagement involves an obligation to make reparation."[2]

Due to the dominant position that States occupy in the international legal system, State responsibility is the most established from of legal responsibil-

1 *British Claims in the Spanish Zone of Morocco* (1925) 2 RIAA 615, 641.
2 *The Factory at Chorzów (Claim for Indemnity) (Merits)* (1928) PCIJ Series A, No 17, 29.

ity at the international level.[3] By comparison, the responsibility of international organizations remains underdeveloped both in doctrine and in practice.[4] This is particularly clear to see in the context of multinational military operations conducted with the involvement of international organizations.

Since the adoption of the United Nations Charter in 1945, international organizations have assumed a significant role in matters of international security.[5] In discharging its duty to maintain international peace and security, the United Nations (UN) has launched numerous peacekeeping operations, even though the conduct of such activities was not foreseen in the Charter.[6] Other international organizations, above all the African Union, the European Union (EU) and the North Atlantic Treaty Organization (NATO), have also conducted a variety of military operations, in particular since the end of the Cold War.[7] These have ranged from security assistance and stabilization missions at the lower end to high intensity combat operations at the top end of the spectrum.

The involvement of international organizations in the conduct of multinational military operations raises a range of questions about their legal responsibility. These questions are of interest for two main reasons. First, by contributing to the deployment of military forces, whether it is by providing them with a mandate or by controlling the actual conduct of a mission, international organizations are exercising public powers and functions. It is a basic principle of good governance that those who exercise public authority should be answerable for their actions.[8] The principle is of heightened significance in the context of

3 The applicable rules are codified by the International Law Commission in the 'Draft Articles on Responsibility of States for Internationally Wrongful Acts', in (2001) *Yearbook of the International Law Commission*, vol. II(2), 26 (ARSIWA). Generally, see James *Crawford*: State Responsibility: The General Part. Cambridge University Press, Cambridge 2013. For an earlier treatment of the subject, see Clyde *Eagleton*: The Responsibility of States in International Law. New York University Press, New York 1928.

4 For a general treatment of the subject, see Maurizio *Ragazzi* (ed.): Responsibility of International Organizations: Essays in Memory of Sir Ian Brownlie. Martinus Nijhoff, Leiden 2013. For earlier discussions, see Ewa *Butkiewicz*: The Premisses of International Responsibility of Inter-governmental Organizations *Polish Yearbook of International Law* 1981-1982. No. 1. pp. 117–140; Moshe *Hirsch*: The Responsibility of International Organizations Toward Third Parties: Some Basic Principles. Nijhoff, Dordrecht 1995.

5 See Terry *Gill* – Dieter *Fleck* – William H. *Boothby* (eds.): Leuven Manual on the International Law Applicable to Peace Operations. Cambridge University Press, Cambridge 2017. pp. 6–24.

6 Generally, see Cedric *de Coning* – Mateja *Peter* (eds.): United Nations Peace Operations in a Changing Global Order. Palgrave Macmillan, Cham 2019. and Joachim A. *Koops* – Thierry *Tardy* – Norrie *MacQueen* – Paul D. *Williams* (eds.): The Oxford Handbook of United Nations Peacekeeping Operations. Oxford University Press, Oxford, 2015.

7 E.g. see James *Sperling* – Mark *Webber*: NATO Operations. In: The Handbook of European Defence Policies and Armed Forces (eds. Hugo Meijer – Marco Wyss). Oxford University Press, Oxford 2018. p. 888; Niklas *Nováky*: European Union Military Operations: A Collective Action Perspective. Routledge, Milton Park 2018; Adegboyega A. *Ola* – Stanley O. *Ehiane*: Missions with Hindrance: African Union (AU) and Peacekeeping Operations. *Journal of African Union Studies* 2016. No. 1. pp. 113–135; Rodrigo *Tavares*: The Participation of SADC and ECOWAS in Military Operations: The Weight of National Interests in Decision-Making. *African Studies Review* 2011. No. 2. pp. 145–176.

8 Cf. *Gill – Fleck – Boothby*: op. cit. p. 267.

military operations, where international organizations and their staff are potentially involved in decisions about life and death.[9] The legal responsibility of international organizations in such situations therefore serves the interests of good governance, accountability and, ultimately, the rule of law.[10] Second, multinational military operations are marked by certain features, such as shared command and control arrangements, that underline and in some cases intensify the difficulties that affect the responsibility of international organizations more generally. Studying their responsibility for the conduct of multinational military operations therefore harbours broader lessons relevant in other contexts.

The purpose of the present chapter is to provide an overview of the challenges that holding international organizations responsible for wrongful acts committed in the context of multinational military operations presents. Section 2 explores some of the general preconditions for the international responsibility of international organizations, focusing on their legal personality, international obligations and the rules of attribution. Section 3 takes a closer look at how the rules of attribution formulated by the International Law Commission apply in multinational military operations. Given the shortcomings of these rules, section 4 makes a principled argument in favour of multiple attribution and shared responsibility. Section 5 offers some concluding thoughts.

2. PRECONDITIONS OF INTERNATIONAL RESPONSIBILITY

As noted earlier, it is a well-established principle that a breach of an international obligation engages the international responsibility of the State or international organization concerned.[11] The principle forms part of customary international law and has been codified by the International Law Commission in the Articles on State Responsibility (ARSIWA) and the Articles on Responsibility of International Organizations (ARIO).[12] Both instruments recognize that the international responsibility of a State or international organization is engaged if two conditions are satisfied: an act or omission is attributable to a State or international

9 Hylke *Dijkstra*: International Organizations and Military Affairs. Routledge, London 2016. p. 8.

10 Cf. Jutta *Brunnée*: International Legal Accountability through the Lens of the Law of State Responsibility. *Netherlands Yearbook of International Law* 2005. No 1. pp. 21–56. (describing international responsibility as a legal form of accountability).

11 See supra n. 2.

12 ARSIWA; International Law Commission, 'Draft Articles on the Responsibility of International Organizations with Commentaries', in (2011) *Yearbook of the International Law Commission*, vol. II(2), 39 (ARIO). For a general assessment of the ARIO, see Sarah *Bayani*: International Legal Responsibility of International Organizations in the ILC Draft Articles and Beyond. Göttingen University Press, Göttingen 2022; Mirka *Möldner*: Responsibility of International Organizations – Introducing the ILC's DARIO. *Max Planck Yearbook of United Nations Law* 2012. No. 1. pp. 281–327 Niels M. *Blokker*: Preparing Articles on Responsibility of International Organizations: Does the International Law Commission Take International Organizations Seriously? A Mid-term Review. In: Research Handbook on the Law of International Organizations (eds. Jan Klabbers – Åsa Wallendahl). Edward Elgar, Cheltenham 2011. p. 313.

organization and this act or omission constitutes a breach of an international obligation of that State or organization.[13]

For international organizations, meeting these conditions is not straightforward. For a start, international organizations are able to incur international responsibility only if they are subjects of international law; in other words, they can be responsible only if they enjoy international legal personality. Although the Charter does not confer international legal personality on the UN in express terms, its existence as a legal person has been recognized by the International Court of Justice in the *Reparation for Injuries* case.[14] There, the Court deduced the legal personality of the UN from its objectives, functions, organs, legal capacities and position of relative detachment from its member States, concluding that "the Organization was intended to exercise and enjoy, and is in fact exercising and enjoying, functions and rights which can only be explained on the basis of the possession of a large measure of international personality and the capacity to operate upon an international plane."[15]

By comparison, the legal personality of the EU has been subject to prolonged debate. From the early 2000s onwards, the EU has increasingly engaged in certain activities, for example concluding agreements with third parties,[16] which seemed to imply that it enjoyed legal capacities and hence legal personality under international law. These developments prompted some commentators to declare the Union to be an international legal person, despite the absence of any provision to this effect in its founding agreements.[17] However, the question remained unresolved,[18] at least until the Lisbon Treaty settled it by conferring legal personality on the EU in express terms.[19]

The legal personality of NATO is not free from difficulty either. NATO's founding instrument, the North Atlantic Treaty,[20] is silent on the matter. By contrast, the Ottawa Agreement on the status of NATO declares that the Organization

13 ARSIWA Article 2; ARIO Article 4.

14 *Reparation for Injuries Suffered in the Service of the United Nations* (Advisory Opinion) (1949) ICJ Reports 1949, 174.

15 Ibid, p. 179.

16 E.g. Agreement between the European Union and the Federal Republic of Yugoslavia (FRY) on the activities of the European Union Monitoring Mission (EUMM) in the FRY, 25 April 2001, OJ [2001] L125/2.

17 Editorial Comments: The European Union–A New International Actor. *Common Market Law Review* 2001. No. 4. pp. 825–828.

18 For different positions in the debate, see Jaap W. *de Zwaan*: The Legal Personality of the European Communities and the European Union. *Netherlands Yearbook of International Law* 1999. No. 1. pp. 75–113; Rafael *Leal-Arcas*: EU Legal Personality in Foreign Policy? *Boston University International Law Journal* 2006. No. 2. pp. 165–212; Aurel *Sari*: The Conclusion of International Agreements by the European Union in the Context of the ESDP. *International and Comparative Law Quarterly* 2008. No. 1. pp. 53–86.

19 Treaty on European Union, OJ [2012] C326/13. Article 47.

20 North Atlantic Treaty, 4 April 1949, 34 UNTS 244.

shall possess "juridical personality",[21] while the Paris Protocol on the status of international military headquarters set up pursuant to the North Atlantic Treaty declares that the two supreme headquarters created under the Treaty, the Supreme Headquarters Allied Powers Europe and the Headquarters Supreme Allied Commander Transformation, shall possess "juridical personality" too.[22] Accordingly, NATO is not a monolithic entity, but made up of three distinct organizations, each with its own legal status.[23] While juridical personality under both the Ottawa Agreement and the Paris Protocol refers to a legal position within the domestic law of NATO's member States,[24] the Organization and the two supreme headquarters have engaged in activities, such as concluding international agreements,[25] that imply the possession of legal personality under international law as well. In fact, the international legal personality of NATO has been recognized by the Organization itself and also by its member States,[26] for example in proceedings before the International Court of Justice and the European Court of Human Rights.[27] What complicates matters, however, is that decisions within NATO are taken by consensus at all levels. This has led NATO to emphasize that each "member State retains full responsibility for its decisions" taken within the Alliance[28] and has prompted some commentators to question whether acts carried out by NATO ought to be ascribed to its member States, rather than to the Organization.[29]

A second difficulty concerns the international obligations of international organizations.[30] A wide range of legal regimes may apply to the conduct of military

21 Agreement on the Status of the North Atlantic Treaty Organization, National Representatives and International Staff, 20 September 1951, 200 UNTS 4. Article IV.

22 Protocol on the Status of International Military Headquarters Set up Pursuant to the North Atlantic Treaty, 28 August 1952, 200 UNTS 340. Article X.

23 Andrés B. *Muñoz Mosquera*: The North Atlantic Treaty: Article 9 and NATO's Institutionalization *Emory International Law Review* 2019. No. 4. p. 157. See Steven *Hill*: Practicing Law at NATO Headquarters. In: Legal Advisers in International Organizations (ed. Jan Wouters). Edward Elgar, Cheltenham 2023. p. 337, pp. 338–339.

24 David *Nauta*: The International Responsibility of NATO and its Personnel during Military Operations. Brill, Leiden 2017. p. 93

25 See *Hill*: op. cit. pp. 343–344.

26 North Atlantic Treaty Organization, in International Law Commission, 'Responsibility of international organizations: Comments and observations received from international organizations', 14 February 2011, UN Doc. A/CN.4/637, 11.

27 E.g. Preliminary Objections of the Portuguese Republic, 5 July 2000, in *Legality of Use of Force (Serbia and Montenegro v. Portugal)*, Preliminary Objections (2004) ICJ Rep. 1160, para. 131; *Banković and Others v. Belgium*, App. No. 52207/99, Judgment, 12 December 2001 (2007) 44 EHRR SE5, para. 32.

28 North Atlantic Treaty Organization 12.

29 See Gérard *Cohen-Jonathan:* Cour européenne des droits de l'homme et droit international général. *Annuaire Français de Droit International* 2000. No. 1. p. 632; Tarcisio *Gazzini*: NATO Coercive Military Activities in the Yugoslav Crisis (1992–1999). *European Journal of International Law* 2001. No. 3. p. 424; Torsten *Stein*: The Attribution of Possible Internationally Wrongful Acts: Responsibility of NATO or of Its Member States? In: Kosovo and the International Community: A Legal Assessment (ed. Christian Tomuschat) Kluwer Law International, The Hague 2002. p. 181, pp. 190–191.

30 Generally, see Kristina *Daugirdas*: How and Why International Law Binds International Organizations. *Harvard International Law Journal* 2016. No. 2. pp. 325–381.

operations. In addition to international human rights law and the law of armed conflict, these include international refugee law, the law of the sea, international environmental law and international criminal law. In most cases, international agreements are a key source of these rules. However, the majority of the relevant agreements, such as the four Geneva Conventions of 1949 and their two Additional Protocols of 1977,[31] are open only to States, meaning that international organizations are not bound by them. As a result, the international obligations of international organizations derive principally from other sources. The International Court of Justice has held that international organizations are "subjects of international law, and, as such, are bound by any obligations incumbent upon them under general rules of international law."[32] Nevertheless, this leaves gaps and open questions.

For example, there is broad support for the notion that the UN and other international organizations are bound by the customary rules of the law of armed conflict.[33] In 1999, the UN Secretary-General issued a Bulletin on Observance by United Nations Forces of International Humanitarian Law, which recognizes that the "fundamental principles and rules of international humanitarian law" set out in that instrument "are applicable to United Nations forces when in situations of armed conflict they are actively engaged therein as combatants."[34] However, the Bulletin is not a comprehensive statement of the entire body of customary rules of the law of armed conflict.[35] Nor do international organizations have the capacity to respect and implement all such rules, including those calling for criminal jurisdiction over serious violations of the law of armed conflict, owing to their more limited functions and resources.[36] Moreover, it is not settled under what exact conditions UN peacekeeping operations and other multinational forces become parties to an armed conflict.[37] The precise scope of the obligations that international organizations are bound by in this area is therefore not free from doubt.

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31 E.g. see Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field (Geneva Convention I), 1949, 75 UNTS 31. Article 60. and Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts (Additional Protocol I), 1977, 1125 UNTS 3. Article 94.

32 *Interpretation of the Agreement of 25 March 1951 between the WHO and Egypt* (Advisory Opinion) (1980) ICJ Rep. 73, para. 37.

33 E.g. Frederik *Naert*: International Law Aspects of the EU's Security and Defence Policy, with a Particular Focus on the Law of Armed Conflict and Human Rights. Intersentia, Antwerp 2010. pp. 515–537; Marten *Zwanenburg*: Accountability of Peace Support Operations. Martinus Nijhoff, Leiden 2005. pp. 131–208.

34 United Nations Secretariat, UN Secretary-General's Bulletin, Observance by United Nation forces of International Humanitarian Law, UN Doc. ST/SGB/1999/13, 6 August 1999. Sec. 1.

35 Paul C. *Szasz*: UN Forces and International Humanitarian Law. *International Law Studies* 2000. No. 2. p. 520.

36 Marco *Sassòli* – Djemila *Carron*: EU Law and International Humanitarian Law. In: A Companion to European Union Law and International Law (eds. Dennis Patterson – Anna Södersten). Wiley Blackwell, Chichester 2016. p. 413, p. 416.

37 E.g. see Bianca *Maganza*: From Peacekeepers to Parties to the Conflict: An IHL's Appraisal of the Role of UN Peace Operations in NIACs. *Journal of Conflict and Security Law* 2020. No. 2. pp. 209–236; Yutaka

The third precondition of international responsibility is attribution. Under international law, States and international organizations are responsible solely for their own conduct,[38] yet as corporate entities they can only act through natural or other legal persons.[39] The purpose of rules of attribution is to resolve this dilemma and determine which acts or omissions should be considered as conduct undertaken on behalf of a particular State or international organization. Rules of attribution thus determine under what circumstances wrongful conduct may be ascribed to a State or international organization.

As the International Court of Justice highlighted in the *Genocide* case, there must be a sufficiently close connection between the wrongful conduct and a State before the conduct can reasonably be attributed to it.[40] According to the Court, certain standards, such as the "overall control" test formulated by the International Criminal Tribunal for the Former Yugoslavia in *Tadić*,[41] are inappropriate for these purposes, because they are too loose and stretch the connection to its breaking point.[42] The suitability of rules of attribution, therefore, depends on whether or not they demand an appropriate kind of connection between wrongful conduct on the one side and the State or international organizations on the other side. Too loose, and the State or international organization will incur liability for wrongs it should not reasonably be held accountable for. Too strict, and liability will not arise where it reasonably should, to the detriment of the aggrieved party. Both of these extremes offend our sense of justice and fairness.

International practice recognizes two basic paradigms of attribution.[43] The institutional paradigm holds that conduct performed in an official capacity by natural or legal persons possessing the status of officials or organs of a State or an international organization under their internal law, and who therefore form part of their "internal machinery",[44] should be attributed to that State or interna-

Arai-Takahashi: The Intervention Brigade within the MONUSCO: The Legal Challenges of Applicability and Application of IHL. *Questions of International Law* 2015. No. 3. pp. 5–23; Tristan *Ferraro*: The Applicability and Application of International Humanitarian Law to Multinational Forces *International Review of the Red Cross* 2013. No. 3. pp. 561–612; Siobhán *Wills*: The Geneva Conventions: Do They Matter in the Context of Peacekeeping Missions? In: Do the Geneva Conventions Matter? (eds. Matthew Evangelista – Nina Tannenwald). Oxford University Press, Oxford 2017. p. 303.

38 *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro)*, (Judgment) (2007) ICJ Rep. 15, para. 406.

39 *German Settlers in Poland*, Advisory Opinion (1923) PCIJ Series B, No 6, 22.

40 Supra n. 38. para 406.

41 *Prosecutor v. Duško Tadić* (1999) Judgment, IT-94-1-T, 15 July 1999 (ICTY Appeals Chamber), para. 131.

42 Supra n. 38. para 406. See also, in this volume, *Kajtár* Gábor: Betudás a nemzetközi jogban – Egység a sokféleségben? In: Nemzetközi szervezetek felelőssége – elmélet és gyakorlat határán (eds. Mohay Ágoston – Kis Kelemen Bence – Pánovics Attila – Tóth Norbert). Publikon Kiadó, Pécs, 2023. pp. 41–58.

43 The language of paradigms is borrowed from Tal *Becker*: Terrorism and the State: Rethinking the Rules of State Responsibility. Hart Publishing, Oxford 2006.

44 International Law Commission, 'Third Report on State Responsibility, by Mr Roberto Ago, Special Rapporteur' (1971) *Yearbook of the International Law Commission*, vol. II(1), 199, 238.

tional organization.[45] By contrast, the agency paradigm states that the conduct of natural or legal persons not forming part of the institutional structure of a State or international organization may nevertheless be attributed to the latter if the conduct in question was performed on their instructions or under their direction or control.[46] In addition to these paradigms, both the ARSIWA and the ARIO recognize certain other, more exceptional grounds of attribution.[47]

The question of attribution is particularly acute in multinational military operations conducted with the involvement of international organizations. This is so because of factors peculiar to this context, including the multitude of legal actors involved, the complex command and control arrangements that apply, the potential incorporation of national contingents into the institutional structure of the international organization and the close relationship that States retain with their armed forces at all times. The next section will explore the implication of these points in greater detail.

3. ATTRIBUTION IN MULTINATIONAL MILITARY OPERATIONS

Military operations conducted by a single State usually do not pose any special problems of attribution. This is so because the armed forces constitute an organ of their State. Their conduct is attributable to the State to which they belong under the institutional paradigm. Difficulties may arise where soldiers act beyond or contrary to their orders, but rules exist to address such cases.[48] Since by definition no other State or international organization is involved in such operations, the question whether any wrongful conduct should be attributed to an entity other than the State to which the forces belong generally does not arise.

Multinational operations, by contrast, raise distinct problems. In such operations, States typically place members of their armed forces at the disposal of another State or international organization and to this end transfer some degree of authority over their forces. Two points must be emphasized here. First, the degree of authority conferred varies.[49] At one extreme, a State may make its troops available to another entity for limited purposes only and may confer

45 ARSIWA Article 4; ARIO Article 6.
46 ARSIWA Article 8; ARIO Article 7.
47 E.g. ARSIWA Article 10. (conduct of an insurrectional or other movement); ARIO Article 9. (acknowledgement).
48 ARSIWA Article 7.
49 On the different levels of command and control, see Carlo *Jean*: Il Controllo degli Stati sulla partecipazione delle loro Forze Armate alle Operazioni di Pace. In: Comando e Controllo Nelle Forze di Pace e Nelle Coalizioni Militari: Contributo alla Riforma della Carta delle Nazioni Unite (ed. Natalino Ronzitti). F. Angeli, Milano 1999. p. 129; Blaise *Cathcart*: Command and Control in Military Operations. In: The Handbook of the International Law of Military Operations. Second edition (eds. Terry D. Gill – Dieter Fleck). Oxford University Press, Oxford 2015. p. 259. See also Annex A, 'Command and Control Definitions', to European External Action Service, 'EU Concept for Military Command and Control - Rev 8', 23 April 2019, Council Doc. 8798/19, 29.

only tactical control. At the other extreme, it may place them at the disposal of another entity more widely and confer powers of operational control. Second, regardless of the degree of authority transferred, States will always retain what is known as full command over their armed forces.[50] Full command is the right to exercise ultimate military authority. It is the military equivalent of what in other fields is sometimes described as *Kompetenz-Kompetenz*, that is a body's authority to determine the scope of its own powers or jurisdiction.[51] The transfer of military authority over national armed forces is therefore never complete and comprehensive. Otherwise, the units affected would cease to function as an effective fighting force of the State to which they belong.[52]

Where a State transfers only limited authority over its armed forces to another entity, it is unlikely to thereby divest itself of responsibility for the acts of its troops. Likewise, such a very limited transfer of authority may be insufficient to engage the responsibility of the receiving entity. However, where the transfer of authority is more than trivial, a number of questions arise. At what point is the responsibility of the receiving entity engaged? At what point, if at all, does the responsibility of the State to which the forces belong become disengaged? And under what circumstances, if at all, is the responsibility of both engaged at the same time?

Answers to these questions may be found it two places in the ARSIWA and ARIO. Both instruments contain a set of general rules of attribution which identify the circumstances under which wrongful conduct must be attributed to a State or international organization. Provided that one of these rules applies, responsibility is engaged. Moreover, provided that the application of one rule does not exclude the application of another, the same wrongful conduct, or different elements of it, may be attributed in principle to several entities at the same time. However, both instruments also contain certain rules of attribution designed to allocate responsibility between States and international organizations. For our purposes, Article 6 ARSIWA and Article 7 ARIO are the most relevant.

Article 6 ARSIWA deals with the attribution of conduct of organs placed at the disposal of one State by another State. It provides as follows:

> "The conduct of an organ placed at the disposal of a State by another State shall be considered an act of the former State under international law if the organ is acting in the exercise of elements of the governmental authority of the State at whose disposal it is placed."

50 E.g. Ashley *Cook*: Kompetenz-Kompetenz: Varying Approaches and a Proposal for a Limited Form of Negative Kompetenz-Kompetenz. *Pepperdine Law Review* 2014. No. 1. pp. 17–34.

51 See Dieter *Fleck*: Legal Issues of Multinational Military Units: Tasks and Missions, Stationing Law, Command and Control. *International Law Studies* 2000. No. 2. p. 171; Rain *Liivoja* – Eve *Massingham* – Simon *McKenzie*: The Legal Requirement for Command and the Future of Autonomous Military Platforms. *International Law Studies* 2022. No. 1. pp. 650–651.

52 See *Attorney-General v. Nissan* [1970] AC 179 (HL), 222.

Several conditions must be satisfied for Article 6 ARSIWA to apply, as the International Law Commission's commentary explains.[53] In the present context, the critical one is the requirement, identified in the commentary, that the organ must be exercising its functions *exclusively* on behalf of the beneficiary State. According to the International Law Commission, "[i]n performing the functions entrusted to it by the beneficiary State, the organ must also act in conjunction with the machinery of that State and under its exclusive direction and control, rather than on instructions from the sending State."[54]

To appreciate the reason for this strict requirement, we must keep in mind the function of Article 6 ARSIWA: it determines under what circumstances the conduct of the organ should be attributed to the beneficiary State, *rather* than to its sending State. Since such circumstances are, in the words of the commentary, "limited and precise",[55] and as such represent a departure from the normal rule whereby the conduct of an organ must be attributed to its sending State, it is reasonable to impose a high threshold of attribution in the form of the "exclusive direction and control" requirement.

However, it is unclear whether this threshold is ever satisfied.[56] On a theoretical level, it may be questioned whether one State ever relinquishes direction and control over one of its organs completely to the exclusive benefit of another State. Would this not entirely severe the link between the organ and its sending State so that it can no longer be regarded as an organ of the latter at all? On a practical level, do organs placed at the disposal of another State not continue to act under the prior instructions of the sending State in carrying out the subsequent instructions of the beneficiary State? If so, can it really be said that the beneficiary State's direction and control is exclusive?

Presumably, there must be some circumstances where the threshold laid down in Article 6 ARSIWA is met, otherwise the rule could never apply and would be redundant. Even so, it is open to question whether the threshold is ever satisfied in the specific context of multinational military operations, where one State places its forces at the disposal of another entity. As we have seen, in all such cases, the sending State transfers only limited control and retains full command over its armed forces. On its face, this practice seems to preclude the possibility that the armed forces of one State could fall under the "exclusive direction and control" of another State. Two alternative conclusions may be drawn from this.

First, we may conclude that a rule like Article 6 ARSIWA is incapable of applying in the present context. States never put their forces under the exclusive

53 International Law Comission: op. cit. p. 44–45.
54 Ibid. p. 44.
55 Ibid.
56 Cf. *R. (Al-Saadoon and Mufdhi) v. Secretary of State for Defence* [2008] EWHC 3098 (Admin), 19 December 2008 (High Court), para. 80.

direction and control of another State or international organization. Since the specific rule of attribution contemplated in Article 6 ARSIWA is therefore inapplicable, the wrongful conduct of troops operating as part of a multinational operation involving the transfer of authority will simply have to be attributed in accordance with the general rules of attribution. Let us call this the "general rules" approach. Second, we may interpret the threshold of exclusivity not to require the sending State to comprehensively relinquish all authority over its armed forces. Such a requirement would be both impractical and illogical, for the reasons mentioned above. Rather, the threshold requires the organ to act under the exclusive direction and control of the beneficiary State only when performing the wrongful conduct in question.[57] In other words, it is not necessary for the foreign organ to act on behalf of the beneficiary State in general. For the purposes of attribution, it is sufficient that it should act under its exclusive direction and control only when it carries out the wrongful conduct. Let us call this the "control" approach.

The International Law Commission seems to have adopted the "control" approach in Article 7 ARIO.[58] This provision provides as follows:

> "The conduct of an organ of a State or an organ or agent of an international organization that is placed at the disposal of another international organization shall be considered under international law an act of the latter organization if the organization exercises effective control over that conduct."

The commentary to Article 7 ARIO draws a distinction between two types of situations.[59] Where a foreign organ is 'fully seconded' to an international organization, its conduct must be attributed to that international organization pursuant to the general rule of attribution laid down in Article 6 ARIO. By contrast, where a foreign organ is "not fully seconded" to an international organization, its conduct must be attributed to the entity which exercised effective control over the conduct in question, pursuant to Article 7 ARIO.

The distinction between fully and not fully seconded organs is problematic for the same reasons as the concept of exclusive direction and control in Article 6 ARSIWA: it is questionable whether a State ever 'fully' seconds its organs to an international organization. However, this difficulty need not detain us, since the commentary to Article 7 ARIO classifies national contingents participating in UN peacekeeping operations as not fully seconded organs on the basis that their sending States retain significant powers over them, including disciplinary pow-

[57] Cf. *H. N. v. Netherlands (Ministry of Defence and Ministry of Foreign Affairs)*, Case No 265615, District Court, The Hague, 10 September 2008, para. 4.10.

[58] See International Law Commission, supra n. 12, 56-60.

[59] Ibid. p. 56.

ers and criminal jurisdiction.[60] Accordingly, the wrongful conduct carried out by national contingents in UN peacekeeping operations, and presumably also in the context of other types of military operations where national forces are placed at the disposal of an international organization, must be attributed to whichever entity exercised effective control over the conduct in question.

Article 7 ARIO thus seems to offer a neat and elegant solution to the problem of attribution in the context of multinational operations: responsibility for the wrongful conduct of national contingents should be allocated to the international organization involved in the conduct of the operation whenever the latter exercises effective control over a contingent.

4. MULTIPLE ATTRIBUTION, SHARED RESPONSIBILITY?

Despite the superficial attraction of Article 7 ARIO, the 'control' approach is flawed as a matter of law and policy. First, it applies the agency paradigm to the exclusion of the institutional paradigm. Rather than permit the attribution of the conduct carried out by armed forces placed at the disposal of an international organization on the basis of either institutional links or factual control, as the 'general rules' approach would have it, it declares that attribution must take place on the basis of factual criteria alone.[61] In other words, Article 7 ARIO is based on the assumption that the correct basis of attribution is factual control, rather than the legal and institutional relations between the actors involved. Why this should be so remains unclear. Specially, it remains unclear why we should ignore the existence of genuine *de jure* ties that bind military contingents both to a State and to an international organization.[62]

Second, by ignoring the legal and institutional status of national contingents, Article 7 ARIO contradicts international practice, in particular practice established in the context of UN peacekeeping operations. Beginning with UNEF, classic UN peacekeeping operations have been established as subsidiary organs of the General Assembly and, more frequently, the Security Council.[63] Occasionally, this model has been adopted by other international organizations as well, such as the Arab League.[64] As organs of the international organization establishing

60 Ibid.

61 Ibid. p. 57.

62 Cf. Tom *Dannenbaum*: Translating the Standard of Effective Control into a System of Effective Accountability: How Liability Should Be Apportioned for Violations of Human Rights by Member State Troop Contingents Serving as United Nations Peacekeepers. Harvard International Law Journal 2010. No. 1. p. 155.

63 Exchange of Letters constituting an Agreement concerning the Status of the United Nations Emergency Force in Egypt, 8 February 1957, 260 UNTS 62. See also *Certain Expenses of the United Nations (Article 17, paragraph 2, of the Charter)*, Advisory Opinion, (1962) ICJ Rep. 151, 177.

64 Letter dated 12 August 1961, addressed by the Secretary General of the League of Arab States to His Highness the Prince of the State of Kuwait, concerning the Status of the Arab League Security Force in Kuwait and Related Arrangements, in 'Note Verbale dated 13 September 1961 from the Secretariat

them, these operations benefit from the legal status of the organization and share its international obligations. Under the institutional paradigm of attribution, this means that their conduct is directly imputable to the organization. Indeed, the UN has consistently recognized that the wrongful conduct of members of its peacekeeping operations is attributable to the Organization and engages its international responsibility.[65]

Third, the declared purposes of Article 7 ARIO is to ensure that wrongful conduct is attributed to one entity rather than another: either to the sending State or to the receiving international organization.[66] In other words, Article 7 ARIO is designed to leave little room for multiple attribution.[67] This contradicts the general approach taken by the International Law Commission, which elsewhere in its commentary to ARIO recognizes that multiple attribution is not excluded by the law of international responsibility.[68] It also runs counter to the way in which the exercise of control over national contingents in multinational military operations is shared between States and international organizations.

Finally, it is appropriate to assess Article 7 ARIO from the more general perspective of accountability. In its broadest sense, accountability refers to the expectation that an actor should be answerable for its actions measured against certain standards of conduct.[69] Accountability, in short, means answerability. It is typically said to arise whenever one actor exercises power over another. The test in Article 7 ARIO assumes that only one entity is capable of exercising effective control over a particular act. In essence, this allocates responsibility to the entity which is the most responsible. However, the lower level of control exercised by the other entity may still justify holding it to account on a residual or secondary basis, if and to the extent that its exercise of power contributed to the wrongful conduct in question. Consequently, from an accountability perspective, the effective control test in Article 7 ARIO is underinclusive.

General of the League of Arab States addressed to the Secretariat of the United Nations, transmitting the Texts of Letters exchanged on 12 August 1961 between His Highness the Prince of the State of Kuwait and the Secretary General of the League of Arab States', 30 November 1961, UN Doc. S/5007. Article 23. Regarding the EU, see Aurel *Sari* – Ramses A *Wessel*: International Responsibility for EU Military Operations: Finding the EU's Place in the Global Accountability Regime. In: The EU's Role in Global Governance: The Legal Dimension (eds. Bart Van Vooren – Steven Blockmans – Jan Wouters). Oxford University Press, Oxford 2013. p. 126, pp. 134–140.

65 E.g. Financing of the United Nations Protection Force, the United Nations Confidence Restoration Operation in Croatia, the United Nations Preventive Deployment Force and the United Nations Peace Forces headquarters: Report of the Secretary-General, UN doc. A/51/389, 20 September 1996, para. 8.

66 International Law Commission, supra n. 12, 56.

67 Christopher *Leck*: International Responsibility in United Nations Peacekeeping Operations: Command and Control Arrangements and the Attribution of Conduct. *Melbourne Journal of International Law* 2009. No 1. p. 361.

68 International Law commission, supra n. 12, 54.

69 See International Law Association Study Group, 'Final Report on the Accountability of International Organizations', in *Report of the Seventy-First Conference held in Berlin* (2004) 164, 168.

What these points suggest is that the factual control test championed by Article 7 ARIO is insufficiently nuanced for the attribution of conduct to international organizations in the context of multinational military operations. However, it is not immediately clear what a suitable alternative would look like.

In the case of multinational operations that are established as organs of an international organization and thus form part of its institutional structure, preference might be given to the institutional paradigm. Accordingly, the integration of a national contingent into the institutional structure of an international organization, coupled with the transfer of operational control over the contingent by the sending State to the organization, should trigger a presumption that the contingent carries out its official functions on behalf of the receiving organization. The presumption may be rebutted, however, if the sending State interferes with the organization's exercise of operational control.[70] One difficulty with this approach is that national contingents have a dual organ status, being part of the institutional framework of the international organization *and* of the State to which they belong.[71] In these circumstances, it is not apparent why their conduct should be attributed to the international organization, rather than to their parent State.[72] One response is to suggest that the transfer of operational control over national contingents to the international organization implies that they will be acting on behalf of the latter—and that it is this transfer which justifies adopting a rebuttable presumption in favour of attributing their conduct to the international organization. However, the fact remains that allocating responsibility to the international organization in this way would not rest solely on the institutional paradigm, but also on the transfer of authority by the State and the assumption of control by the international organization. Except for clear-cut cases, this approach would require determining which entity, the sending State or the international organization, exercised effective control on a case-by-case basis, meaning that it would not differ materially from the position adopted in Article 7 ARIO.

An alternative approach has been taken by the Dutch courts in the *Nuhanović* case. There, the Dutch Court of Appeal held that it was possible for more than one party to exercise "effective control", so that "it cannot be ruled out that the application of this criterion results in the possibility of attribution to more than one party."[73] This finding was upheld by the Dutch Supreme Court.[74] The *Nuhanović*

[70] Cf. *H. N. v. Netherlands*, supra n. 57, para. 4.14.1.

[71] But see *Mothers of Srebrenica*, Case No 17/04567, ECLI:NL:HR:2019:1284, 19 July 2019, Supreme Court of The Netherlands, para. 3.3.3.

[72] Paolo *Palchetti*: International Responsibility for Conduct of UN Peacekeeping Forces: the question of attribution. *Sequência (Florianópolis)* 2015. No. 1. p. 31.

[73] *Hasan Nuhanović v. Netherlands*, Case No 200.020.174/01, ECLI:NL:GHSGR:2011:BR5388, 5 July 2011, Court of Appeal in The Hague, 5 July 2011, para. 5.9.

[74] *Netherlands v. Hasan Nuhanović*, Case No 12/03324, ECLI:NL:HR:2013:BZ9225, 6 September 2013, Supreme Court of The Netherlands, para. 3.11.2.

case opens the possibility of using the factual control test in Article 7 ARIO not as a means for the exclusive attribution of conduct to one party or another, but as a basis for dual or multiple attribution. Used in this way, effective control operates as a threshold that justifies attribution of conduct to *any* party, rather than as a rule which attributes the conduct exclusively to one party or another.[75] However, this approach is not free from difficulties either. Apart from the fact that it still ignores institutional ties, the Court of Appeal's reasoning in *Nuhanović* was based on the idea that control exists not just where a party exercises authority as a matter of fact, but also where it has the power to prevent wrongful conduct.[76] This makes sense, in so far as it reflects the fact that responsibility may arise not only for positive acts, but also for omissions. However, since States retain full command over the forces they place at the disposal of international organizations, they would be responsible for any wrongful conduct carried out by their troops on the basis that they retain the power to issue binding instructions. This is too sweeping and may be inappropriate in situations where the international organization was more intimately involved in the wrongful conduct.[77] However, it may be suitable as a secondary or residual basis of responsibility that reflects the continued status of seconded national contingents as organs of their sending State.[78]

5. CONCLUSION

Despite the long-standing involvement of international organizations in the conduct of military operations, their international responsibility in this context remains unsettled.[79] The fact that multinational operations typically involve the participation of several States and international organizations raises the prospect that their acts and omissions could be attributed to more than one international legal person. Article 7 ARIO seeks to resolve this matter by at-

[75] However, this does not reflect the original design of Article 7 ARIO: see Pierre *d'Argent:* State Organs placed at the Disposal of the UN, Effective Control, Wrongful Abstention and Dual Attribution of Conduct. *Questions of International Law* 2014. No. 1. pp. 29–31.

[76] Nuhanović, supra n. 73, para. 5.9.

[77] Marten *Zwanenburg*: International Military Operations. In: The Practice of Shared Responsibility in International Law (eds. André Nollkaemper – Ilias Plakokefalos). Cambridge University Press, Cambridge 2017. p. 639 p. 650; *d'Argent*: op. cit. pp. 27–29. More generally on the dangers of extending responsibility to the member States of international organizations too readily, see Niels *Blokker*: International Organizations and Member State Responsibility: Critical Perspectives. In: Member State Responsibility for Wrongdoings of International Organizations: Beacon of Hope or Delusion? (eds. Ana Sofia Barros – Cedric Ryngaert – Jan Wouters). Brill, Leiden 2017. p. 34.

[78] Cf. Berenice *Boutin*: Attribution of Conduct in International Military Operations: A Causal Analysis of Effective Control. *Melbourne Journal of International Law* 2017. No 2. pp. 154–179.

[79] A fact reflected in the 'great variety' of ways in which the Dutch courts have dealt with the attribution of conduct in the cases arising out of Srebrenica, as note by Cedric *Ryngaert* – Otto *Spijkers*: The End of the Road: State Liability for Acts of UN Peacekeeping Contingents After the Dutch Supreme Court's Judgment in Mothers of Srebrenica (2019). *Netherlands International Law Review* 2019. No. 3. p. 539.

tributing the wrongful conduct to the international organization, rather than a troop-contributing State, if the organization exercises effective control over the conduct. However, this approach is underinclusive, as it ignores the ties that continue to bind national contingents to their sending States. Also, jurisdictional immunities may prevent private claimants from bringing claims against an international organization before domestic courts.[80] Considerations of accountability therefore militate in favour of the multiple attribution of wrongful conduct. The Dutch courts have charted a way forward in this respect by recognizing that effective control does not have to be exclusive, but that more than one entity could exercise effective control over the same matter. This opens the door towards a more nuanced allocation of responsibility compared to Article 7 ARIO. However, this approach is an innovation, rather than a distillation of existing practice.[81] In fact, States have at times insisted that responsibility in multinational operations should lie with the international organization involved, rather than with them.[82] While sharing responsibility among the various States and international organizations participating in multinational operations would best serve the interests of accountability, for now, international practice is not sufficiently well developed to offer firm guidance on how the various legal consequences of international responsibility should be weighed between them.[83]

80 E.g. *Stichting Mothers of Srebrenica and Others v. The Netherlands*, App. No 65542/12, Admissibility, 11 June 2013, European Court of Human Rights, paras 130–170; *El Hamidi and Chlih v. North Atlantic Treaty Organization (NATO) and Belgium (intervening)*, Appeal Decision, JT 6772, 23 November 2017, Brussels Court of Appeal, paras 18–34.

81 André *Nollkaemper*: Dual Attribution: Liability of the Netherlands for Conduct of Dutchbat in Srebrenica. *Journal of International Criminal Justice* 2011. No. 5. p. 1152; Bérénice *Boutin*: Responsibility of the Netherlands for the Acts of Dutchbat in *Nuhanović* and *Mustafić*: The Continuous Quest for a Tangible Meaning for 'Effective Control' in the Context of Peacekeeping. *Leiden Journal of International Law* 2012. No 2. pp. 533–534.

82 E.g. Preliminary Objections of the French Republic, 5 July 2000, in *Legality of Use of Force (Serbia and Montenegro v. France)*, Preliminary Objections (2004) ICJ Rep. 575, paras 23–24; Preliminary Objections of the Kingdom of the Netherlands, 5 July 2000, in *Legality of Use of Force (Serbia and Montenegro v. Netherlands)*, Preliminary Objections (2004) ICJ Rep. 1011, para. 7.2.13; Preliminary Objections of the Portugese Republic, supra n. 27, 130-141.

83 Cf. Paulina *Starski*: Accountability and Multinational Military Operations. In: The 'Legal 'Pluriverse' Surrounding Multinational Military Operations (eds. Robin Geiß – Heike Krieger). Oxford University Press, Oxford 2019. p. 300, pp. 319–321; Moritz P. *Moelle*: The International Responsibility of International Organisations: Cooperation in Peacekeeping Operations. Cambridge University Press, Cambridge 2017. p. 201.